IN THE

Supreme Court of the United States

October Term, 1976

Nos.: 76-212, 76-458, 76-468, 76-515, 76-520 and 76-522.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,
THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA,
THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN and WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

Appellants,

and

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE L. SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS,
THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA, et al,

Appellee-Respondents.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

John O. Moss
156 E. Market St., Suite 902
Indianapolis, IN 46204

John Preston Ward
2951 North Capitol Ave.
Indianapolis, IN 46204

Charles D. Kelso
4030 N. Pennsylvania Street
Indianapolis, IN 46205
(317) 283-6976

ATTORNEYS FOR APPELLEES-RESPONDENTS
Donny Brurell Buckley and
Alycia Marquese Buckley

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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Appellees-Respondents Buckley move the Court to dismiss the appeal herein and not to grant a writ of cert-

iorari or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Seventh Circuit on the ground that manifestly the questions on which the decision of the case depends are so unsubstantial as not to need further argument.

I

THE QUESTIONS PRESENTED

The ultimate question presented is whether the District Court erred in finding interdistrict violations of the Fourteenth Amendment and ordering a limited interdistrict remedy. This question depends, in turn, upon the question of whether there was sufficient evidence to support findings that the racially invidious effects of

(a) the General Assembly's separation in 1969 of IPS boundaries from those of the City of Indianapolis via the Uni-Gov legislation,

(b) the General Assembly's failure in any other way to alleviate the conditions of segregation within IPS and between IPS and the other school systems in Marion County, and

(c) the placement of all public housing (now 98% black) within IPS,

were traceable ultimately to the purposeful discrimination and interdistrict violations evidence by

(1) Indiana's almost 100 years history of racial discrimination, prior to 1949, in school attendance laws, in enforcing racial covenants in housing, and in other policies which discriminated against black people, denying them residential and educational opportunities in Marion County in areas other than an all-black residential community in the center of Indianapolis, served by Crispus Attucks, the lone all-black high school, and

(2) The commission by state officials of acts of *de jure* segregation during the 1950s and 1960s, particularly in approving the location of three new all-white high schools well away from the path being taken by the expending black residential area toward and, eventually, in some places, across the borders of IPS, and

(3) The obvious effects of Uni-Gov, the General Assembly's signalled lack of concern with aleviating the segregation problem, and the placement of public housing in making it impossible to deal effectively with the interdistrict and intradistrict conditions of segregation theretofore brought about in substantial part by actions of the state without an interdistrict remedy.

II

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

The Statutes involved in this litigation are:

(1) Chapter 15, R. S. 1843 p. 306, 320 § 102 (See *Lewis v. Henley*, 2 Ind. 332 (1850)). This act barred Negroes from admission to the common schools.

(2) Acts 1869, Ch. 16, #3, p. 41. This Act, for the first time in Indiana, provided for the education of black students, but required that they should be organized into separate schools.

(3) Acts 1877, Ch. 81, #1, p. 124. This Act required admission of black students to white schools, if no separate school of comparable grade was provided for black students.

(4) Act 1935, Ch. 296, #1, p. 1457. This Act required the Board to provide transportation for black students required to travel more than a certain distance by reason of the State's segregation policies.

(5) Acts 1935, Ch. 77, #1, p. 23. This Act, in effect, ordered township trustees to furnish a separate school building and teacher for the instruction of a black student rather than permit that child to attend a white school.

(6) Acts 1949, Ch. 186, p. 603; Burns Ind. Stat. Ann. #28-6106 o 28-6112 (1970), as amended I.C. 1971, 20-4-1-7 to 20-4-1-13. This Act declared that it was the policy of the State to desegregate public education, one grade at a time.

(7) The 1959 Indiana School Reorganization Act, Acts 1959, ch. 202 #1; Burns Ind. Stat. Ann. #28-3501 (1961); I.C. 1971, 20-4-1-1, et seq. This Act created a school consolidation plan except for Marion County.

(8) Acts 1961, ch. 186, #1; Burns Ind. Stat. Ann. #28-3610 (1971); I.C. 1971, 20-3-14-1 et seq. This Act provided that extension of civil city boundaries automatically extended corresponding school city boundaries—subject to remonstrance by the school city whose territory was taken, a provision which in its operation blocked expansion of IPS.

(9) Acts 1969, ch. 62 #3; Burns Ind. Stat. Ann. 28-3618 (1971); I.C. 1971, 20-3-14-9. This Act, adopted 16 days before Uni-Gov., amended the 1961 Act cited above by abolishing the power of IPS to follow municipal annexations.

(10) Acts 1969, ch. 173, #101; Burns Ind. Stat. Ann. ##48-9101 et seq., I.C. 1971, 18-4-1-1 et seq. This Act, the so-called Uni-Gov Act, reorganized government in Marion County but specifically excluded school districts.

(11) P.L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. #28-5031—28-5040, I.C. 1971, 20-8.1-6.5 et seq. This Act provided that a transferor school corporation must pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a final court order based upon a violation of the Equal Protection Clause.

B. The Proceedings Below

Indianapolis I. United States v. Board of Sch. Com'rs., Indianapolis, Ind., 332 F. Supp. 655 (S.D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir. (1973))., cert. den. 413 U.S. 920, 93 S. Ct. 6066, 37 L. ed. 1041 (1973). The District Court's opinion in this first phase of the litigation found that

(1) The state has ultimate responsibility for education in Indiana. 332 F. Supp. 655, at 659.

(2) Before Statehood, slavery was recognized in Indiana. Id. at 660.

(3) After Statehood, discrimination was the official policy of the state. There were constitutional limitations on the right of blacks to vote (not removed until 1881) and to serve in the militia (not removed until 1936). Statutes limited the right of blacks to give testimony in court, to intermarry, to inherit, and required that they post bond on coming into the State as a pledge of good behavior.

Id. at 660, 661. The district court also pointed out that.

> "Negroes were rarely admitted, save on a segregated basis, to theaters, public parks, and the like, including State parks operated by the Indiana Department of Conservation, until after World War II. They were confined to segregated wards in public hospitals supported by tax funds, and as we shall see, largely attended segregated schools." 332 F. Supp. 655 at 661.

(4) Segregation in the housing of black families persisted in Indianapolis at least until the date of the filing of this action. The court listed a number of informal methods by which this was carried out, including racial covenants in housing. Id. 661-63.

(5) With respect to involvement of the areas surrounding Indianapolis in these segregation practices, the court noted that,

> "It is common knowledge that in many small towns and a few of the larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials. Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the School City of Indianapolis. Marion County has three municipalities other that Indianapolis, all contiguous to the School City. Beech Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17% are Negro. Of these, approximately 122,086, or 98.5% are confined to the central

> area served by the defendant School Board." 332 F. Supp. 655 at 663.

(6) The court reviewed pre-1949 Indiana Statutes which established segregation in the schools as the official policy of the State. It noted that from the inception of public education in Marion County was segregated, beginning with a building on Market Street. When Crispus Attucks was opened in September, 1927, all Negro high school students were compelled to attend it, regardless of their place of residence in the city. Id. at 664.

(7) The court engaged in a painstakingly detailed analysis of school attendance figures and Board practices between 1949 and 1954 and after 1954 to the time of the litigation. He concluded that the Board had purposefully attempted to cement in place the segregated character of the elementary and high schools. The techniques used to continue segregation included attendance zone boundary changes, the construction of additions, the construction of new schools, the provision of transportation or the adjustment of existing transportation, alternation in grade structures, the location or relocation of special education classes, optional attendance zones, and various combinations of these techniques. Id. at 665-70.

(8) Since the instant litigation was filed, the Board took a few steps to rectify its failure to comply with *Brown II*, but was unwilling to proceed further unless ordered by the court. Id. at 670-72.

(9) The court recounted external problems facing the Board: relocation of white families into surrounding school districts and the location of low rental

public housing projects in the city (typically on the periphery of an established Negro residential area so that they attracted Negro occupancy and thus affected the racial composition of the school serving that area). Id. at 672-673.

(10) The court then considered Uni-Gov, and the 1961 Act because of which, said the court,

> "For the first time, it became possible for the School City of Indianapolis, alone among the major school cities of the State, to have jurisdiction over a lesser territorial area than the corresponding civil city." 332 F. Supp. 655 at 675.

With regard to the combined effect of Uni-Gov and that Act the court stated that,

> "Considering the history of segregation of the Negro in Indiana and in Indianapolis, the racial complexion of the outside school corporations and the adjoining counties in the Indianapolis Metropolitan Area, the ongoing flight to the suburbs by the white population of the School City, and the various other factors above set out, the effect of the 1961 and 1969 Acts of the General Assembly referred to in this section may well have been to retard desegregation and to promote segregation. In other words, under previous Indiana law, which still applies to all cities except Indianapolis, civil annexation would automatically carry school annexation with it, and the chances of successful remonstrance against logical annexation by an expanding municipality, carrying with it the usual municipal services, would be virtually nil. Under the present law, if valid, the ability of the Board to expand its jurisdiction coterminous with the consolidated city, or for that matter to expand it at all, is likewise virtually nil, as a practical matter." 322 F. Supp. 655 at 676.

(11) The court found that the school system in Indianapolis was near the tipping point where the white exodus might become accelerated and irreversible. Id. at 676-77.

The district court then concluded that the Board was in violation of the Constitution and had a duty to take steps to convert to a unitary system in which racial discrimination would be eliminated root and branch. The court devised an interim plan and ordered that additional parties be joined in the litigation for the purpose of considering the full range of problems presented by the case, including the effects of the statutes previously mentioned. Id. at 677-681.

The Court of Appeals affirmed the district court 474 F. 2d 81 (1973). It noted that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents. The appellants had denied any conscious motivation to foster or continue segregation policies. However, said the court,

> "In examining that which was in existence at the time of Brown I and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consummated acts. Intent in this sense, may or may not be consistent with expressed motivation." 474 F. 2d 81, at 84-85.

The court then held that not only was the district court's inference as to intent not clearly erroneous but, also, was "proper". Said the court,

> "As to this last point, we can only emphasize that there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly

inferred from the objective actions." 474 F. 2d 81 at 88.

Indianapolis II United States v. Board of School Com'rs. 368 F. Supp. 1191 (S.D. Ind., 1973). Aff'd in part 503 F. 2d 68 (7th Cir. 1974). In the second trial of this case the parties were IPS, ten school systems located in Marion County, 10 school systems located outside Marion County, the State Defendants, and plaintiffs Buckley and the United States.

In its opinion, the court first found that because of racial percentages, white exodus, and the tipping point phenomenon, that a desegregation plan which, pursuant to *Green v. Board,* 391 U.S. 430 (1968), promises realistically to work, could not be put into effect within the boundaries of IPS. 368 F. Supp. 1191, at 1197-99. It then analyzed the education laws of Indiana in great detail, concluding that the State assumes responsibility for the conduct of local school corporations.

> "Such corporations were and still are involuntary corporations established as part of the school system of Indiana and are but agents of the State for purposes of administering the State system of education." 368 F. Supp. 1191, at 1201.

Actions of such corporations, said the court, must be considered acts of the State. Id. at 1199-1202.

The court found once again that the location of three new high schools in Indianapolis was an act of *de jure* segregation (Arlington, 1961, black enrollment .23% Northwest, 1963, black enrollment 0.0%; John Marshall, 1967, black enrollment 0.3%). The sites for the three high schools were approved by the appropriate agencies of defendants the Indiana State Board of Education and the

Superintendant of Public Instruction. These acts, held the court, were acts of segregation on the part of officials of the State. Similar examples, said the court, could be pointed out with regard to site selection for construction and enlargement of elementary schools, but there was no need to labor the point . 368 F. Supp. 1191, at 1202-03.

The court then said that,

> "Further, at all times since 1949, the Indiana statute forbidding racial segregation in educational opportunity has been in effect, IC 1971, 20-8-6-1 et seq., Burns 28-6106 et seq., and the mandate of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), has been the law since 1954. According to the evidence in this case, the officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. Even at this late date, the division of equal educational opportunity of the Indiana Department of Public Instruction, headed by the State Superintendent, consists of but four staff members and a secretary, to cover the entire State of Indiana, and has only been in existence for the past two years pursuant to a Federal grant. The Court finds that failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation." 368 F. Supp. 1191, at 1203.

Turning to the possible impact of other actions by the State, the court said that

> "Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the

urban centers of the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else." 368 F. Supp. 1191, at 1204.

Elaborating, the court added that,

> "Such racial discrimination, which has been tolerated by the State at the least, and in some instances has been actively encouraged by the State, as set out in this Court's previous opinion, has had, as its end result, the creation of an artificial unrepresentative community, as pictured by the exhibits in this case. At the very least it may be said that Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State." 368 F. Supp. 1191, at 1204-05.

The court concluded that the acts of *de jure* segregation found by the court are imputed to the State, that state officials had engaged in acts of *de jure* segregation, both by commission and omission, and that the General Assembly should be given a reasonable time to devise a feasible plan for ending the conditions of segregations then existing. Id. at 1205. Said the court,

> "In short, paraphrasing the holding of the Sixth Circuit in *Bradley et al. v. Milliken et al., supra,* this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II. Brown v. Board of Education,* 349 U.S. 294, 300-301, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines."

The court then proceeded to fashion a metropolitan-wide remedy. Id. at 1206-1210.

This decision of the District Court was affirmed, 503 F. 2d 68 (7th Circuit, 1974), as to its findings of *de jure* segregation. Said the court

> "We conclude, as the district court did, that the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency utimately charged under Indiana law with the operation of the public schools has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries." 503 F.2d 68, at 80.

However, on the authority of *Milliken v. Bradley,* the decision was reversed as to remedies directed to school corporations outside of Marion County.

As to a metropolitan remedy within Uni-Gov boundaries, the case was remanded for further proceedings consistent with *Milliken v. Bradley,* specifically,

> "The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.*" Id. at 86.

This court denied certiorari, 421 U.S. 929 (1975).

Indianapolis III. United States v. Board, 368 F. Supp. 1223 (S.D. Ind., 1973) was a supplemental memorandum of decision in which Judge Dillin explored guidelines that the legislature might use in carrying out its constitutional responsibilities.

Indianapolis IV. The instant phase of the case grows out of the remand of *Indianapolis II.* The findings and conclusions of the district court, unreported, may be found on page 36 of the appendix to the Jurisdictional Statement of The School Town of Speedway (No. 76-458.)

The District Court determined in *Indianapolis IV* that the establishment of the Uni-Gov (county-wide) boundaries of the City of Indianapolis without a like re-establishment of the Indianapolis Public School boundaries, taken together with all of the other evidence, warranted a limited interdistrict remedy within Uni-Gov (an area limited to territorial Marion County, Indiana), in accord with *Milliken v. Bradley.* 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 1069 (1974). After finding interdistrict violations of the constitution, the court ordered the transfer of about 6,533 black students to school systems surrounding IPS. After that transfer, the percentage of black pupils in IPS, said the court, would be below the point where resegregation inevitably occurs. That point according to findings of the district court (affirmed by the Court of Appeals), occurs when the percent of black students in a given school approaches 25% to 30%, more or less. The total enrollment of black students in each of the transferee school corporations will be approximately 15% black. Pursuant to Indiana statute, the transferor corporation (IPS) will pay the transferee school corporations (appellants) for the cost of educating the transferred

pupils. Acts 1974, P.L. 94 § 1, et seq. Burns Ind. Stat. Ann. §§ 38-5031-28-5040. I.C. 1971 20-8.1-6.5-1 et seq.

Appellant school districts appealed to the United States Court of Appeals for the Seventh Circuit. They were joined in this appeal by certiorari petitioners Otis R. Bowen as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, Harold H. Negley as Superintendent of Public Instruction of the State of Indiana and the Indiana State Board of Education, a public corporation body.

The Court of Appeals affirmed the district court in an opinion by Judge Swygert (Judge Tone dissenting). The majority found that Uni-Gov and its companion 1969 legislation were a substantial cause of interdistrict segregation contributed to the separation of the races by redrawing school district lines had an obvious racial segregative impact, and were not supported by any compelling state interest that would have justified the General Assembly's failure to consider the needs of the school system in its decision to enact Uni-Gov, thereby signalling its lack of concern with the whole problem and thus inhibiting desegregation with (sic) IPS.

The District Court in *Indianapolis IV* also found that the location by state instrumentalities of public housing (now having 98% black residents) on or near the Indianapolis Public School boundaries significantly affected the racial composition of schools within IPS and increased the separation of the races between IPS and the surrounding school districts. The District Court considered this fact together with the failure to enlarge IPS boundaries by Uni-Gov (or in any other way) in reaching its decision that an interdistrict violation had occurred and that a limited interdistrict remedy should include enjoining the Housing Authority from building additional public housing

within IPS and from renovating Lockfield Gardens for other than the elderly. The United States Court of Appeals for the Seventh Circuit affirmed this injunction (Judge Tone dissenting). The court stated that,

> "The record supports these findings and clearly shows a purposeful racially discriminatory use of state housing." (Speedway Appendix, P. A 23)

It should be stressed that the courts below have not held a state statute unconstitutional. Appellees agree with the statements of the Indianapolis Board of School Commissioners on page 3 of its response to an application for stay filed in this court.

> "Neither the decision and judgment of the District Court nor the opinion and judgment of the Court of Appeals declared or adjudged any of the three referenced 1969 Indiana Acts to be unconstitutional, enjoined the continued operation of any of such Acts, or directed any of the applicants or any other state officials to take action conflicting with their duties and responsibilities under any of such Acts."

Rather than find a state statute unconstitutional, the courts below have merely held that the General Assembly's failure to expand the boundaries of IPS through the Uni-Gov statute or in any other way to alleviate the conditions of segregation existing within IPS and between IPS and the other school systems in Marion County, taken together with all of the other evidence, helped establish an interdistrict violation and justified a limited interdistrict remedy. Thus, the courts below, examining all of the evidence, have traced the actions of the state and the existing interdistrict separation of the races ultimately to racially discriminatory purposes.

III

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY BY THIS COURT AND THE DECISIONS BELOW WERE CORRECT AND NOT IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS

Neither the District Court, in entering its order, nor the Court of Appeals, in affirming, intimated that this case involves a new or disputed point of law. Instead, both courts stated that they were applying to the evidence the basic principles of *Brown v. Board of Education*, 349 U.S. 294 (1955), and *Green v. County School Board*, 391 U.S. 430 (1968), as elaborated with respect to interdistrict violations and remedies by *Milliken v. Bradley*, 418 U.S. 717 (1974). In Milliken, this Court said that,

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation." *Milliken v. Bradley*, 418 U.S. 717, 744.

Judge Tone, dissenting, did not disagree with the District Court and the Circuit Court majority that *Milliken v. Bradley* stated the applicable law. Nor did he deny that state action had properly been found discriminatory or

that state action had been a substantial cause of interdistrict segregation. Rather, he asserted that the evidence did not establish, nor did the courts find, that excluding school boundaries from Uni-Gov and locating certain public housing projects within IPS were racially motivated actions. Thus, he concluded, there was no proof of a relevant racially discriminatory purpose. In support of his theory he cited *Washington v. Davis,* 96 S. Ct. 2040 (1976), in which this Court stated,

> "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis,* 96 S. Ct. 2040, 2048 (1976).

To the contrary of Judge Tone's analysis and in support of the decisions below, appellees submit two points:

(1) The District Court and the Court of Appeals, in accord with this court's holding in *Milliken* and its statement in *Washington v. Davis,* have properly found purposeful intradistrict and interdistrict violations by the state. Judicial opinions in *Indianapolis I, II* and *IV* have traced the invidious quality of Uni-Gov and the location of public housing ultimately to a number of purposeful discriminations of the state. They include, but are not limited to, over 100 years of state supported racial discrimination in education and housing and, since 1954, acts of *de jure* segregation by state officials who also did "nothing, or next to nothing" to implement the State's 1949 declaration of a nondiscriminatory policy in education. Further, the state has not shown, in accord with *Keyes v. School District No. 1,* 413 U.S. 189 (1973), that the intradistrict and interdistrict segregative effects of those purposeful discriminations within IPS and between IPS and

the rest of Marion County have become so attenuated that "the current segregation is in no way the result of those past segregation actions" *Keyes, supra,* at 211, n. 17.

(2) Even if Judge Tone's dissent correctly sought evidence of racial motivation in only the immediate context of the state's action on Uni-Gov and in locating public housing (ignoring all historical context), the opinions of the District Court and the Court of Appeals may fairly be interpreted to find purposeful discrimination based upon the current context, and such findings are not clearly erroneous in light of the evidence.

A. The invidious quality of Uni-Gov's failure to reestablish school lines or create transfer policies and the invidious quality of location all public housing within IPS has properly been traced by opinions in this case ultimately to racially discriminatory purposes of the State with respect to intradistrict and interdistrict segregation and separation of the races.

The opinion of the district court in *Indianapolis I* explained in great detail (by reference to Indiana Constitutions and to Indiana statutes and judicial decisions) that for over 100 years prior to 1949, the State of Indiana engaged in a blatent and purposeful policy of racial discrimination. The policy encompassed education, housing, and almost all aspects of life—including militia service, marriage, inheritance and admission to public places. Indeed, said the court,

> "It is common knowledge that in many small towns and a few of the larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials." 332 F. Supp. 655, at 663.

The District Court's opinions in *Indianapolis I* and *II* analyzed how those policies and the customs supported by the policies resulted in the black families in Marion County being confined to a ghetto near the center of Indianapolis. After 1927, black high school pupils were confined to Crispus Attucks, the only high school in Marion County for black students, which had a set of all-black feeder schools.

It is crystal clear, therefore, from opinions of the District Court, affirmed by the Seventh Circuit, that purposeful actions by the State prior to 1949 contributed to the segregation and separation of the races within IPS and between IPS and the other school systems in Marion County.

How attenuated has that influence become since 1949? The District Court explained in *Indianapolis I* and *II* that in 1949 the state passed a declaration of policy calling for the gradual desegregation of public schools, one grade at a time. However, the judge also found from the evidence that state officials took no leadership action to enforce this policy or to interfere with local customs which continued to confine black residential areas to their historic patterns. Indeed, in the 1960's, so found the District Court and the Seventh Circuit, state officials joined IPS officials in purposeful racially discriminatory policies, including the location of three all-white high schools near the borders of IPS, well out of the path being taken by the gradually expanding black residential area toward and, eventually, in several places, across IPS boundaries. Restrictive residential practices continued.

Thus, by 1969, when the legislature undertook to reorganize the government in Marion County, the state had done literally nothing to alleviate the condition of racial segregation and separation within IPS and between

IPS and the surrounding school districts which its own laws and actions of its officials had helped to create and maintain. Its duty at that time, under *Green v. County School Board,* 391 U.S. 430 (1968), was clear: to come up with a plan would root out the remnants of its discriminatory actions. This could have been done by a system of transfers or by enlarging the boundaries of IPS. Instead, reversing a policy of long standing, the legislature detached the boundaries of IPS from those of the City of Indianapolis and expanded the boundaries of Indianapolis to the County Line for most functions of government, including the election of a Mayor, but specifically excluded the public schools. Nor did the legislature provide for transfers or in any other way attempt to alleviate the intradistrict and interdistrict separation of the races which had been brought about in substantial part by its laws and policies and by the practices of state officials. As the Seventh Circuit said,

> "The district court correctly observed, 'When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with (sic) IPS.'" (Speedway Appendix, p. A19.)

In 1974, the General Assembly passed an Act which can realistically be regarded as at least a partial recognition of its duties to deal with the interdistrict aspects of the segregation problem which the state had duties to alleviate. P.L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. #28-5031-28-5040, I.C. 1971, 20-8.1-6.5-1 et seq. This Act provides for the interdistrict transfer of students. The transferor corporation must pay the transferee corporation for the cost of education of a pupil transferred. However, the statute comes into play only if transfer is ordered by a court

because of a violation of the Fourteenth Amendment and all avenues of appeal have been exhausted. Meanwhile, the artificial community hammered into place by state law prior to 1949 continues to exist while the percent of black students in IPS continues gradually to increase.

It is submitted that here, as in *Keyes*, the state has failed to carry its burden of showing that its past acts of intradistrict and interdistrict segregation have become so attenuated that "the current segregation is in no way the result of those past segregation actions." *Keyes v. School District No. 1,* 413 U.S. 189, at 211 n. 17. Here as in *Evans v. Buchanen,* 393 F. Supp. 428 (D. Del. 1975), aff'd. 96 S. Ct. 381 (1975), post-*Brown* acts by the state (e.g., approving the segregative placement of new high schools and elementary schools and siting all public housing projects within IPS) have contributed to intensify the interdistrict separation of the races. Here also, as in *Evans,* the invidious quality of state actions with clear segregation effects can ultimately be traced to a clear racially discriminatory purpose: the purpose which motivated the State's 100 year record of segregation laws, and which continued, apparently unabated, in actions of state officials which did not discourage and which, indeed, abetted the racial discrimination actively practiced by the IPS Board in the 1950s and 1960s.

B. The invidious quality of Uni-Gov and the siting of public housing can be and has been found in even the current context, divorced from the state's past segregation actions.

Appellees-respondents strongly assert that the invidious character of state action which does not alleviate segregated conditions created by purposeful action of the state should not be judged in isolation from that historical con-

ext. However, even if Judge Tone has correctly concluded in his dissent that a discriminatory purpose or motivation must be found by looking only at the current context of state action, it appears that the courts below have made the necessary findings on sufficient evidence.

With respect to housing, the matter could hardly have been put more clearly and succinctly. The District Court found that the location of housing projects on the edge of black residential areas had obviously tended to cause and to perpetuate the segregation of black pupils, saying,

> "The action of these agencies (The Metropolitan Development Commission, the Housing Authority of the City of Indianapolis, and the State) in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white faculties and administrative staffs." (Speedway Appendix p. A40.)

Said the Seventh Circuit, in affirming:

> "The record supports these findings and clearly shows 'a purposeful racially discriminatory use of state housing.' *Milliken v. Bradley* 418 U.S. 717, 755 (1974) (Steward, J. concurring)." Id. at A23.

The Seventh Circuit continued:

> "By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school

children are undoubtably involved, would only further aggravate the school segregation problem." Id. at A24.

Indeed, both the record and the trial court's findings relative to racial discrimination in Public Housing are proper since consistent with this court's holding in *Hills v. Gautreaux,* 96 S. Ct. 1538 (1976).

With respect to the General Assembly's failure in 1969 to reestablish IPS boundaries when it enacted Uni-Gov (or in any other way to alleviate the segregated conditions then existing), the Seventh Circuit had this to say:

> "It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These "fail safe" measures (measures which repealed provisions for automatic extension of school city boundaries with the extension of civil city boundaries) indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes." Id. at A18-19.

What were the evident purposes of such changes? The court answered that question in its very next paragraph: to contribute to the separation of the races between IPS and the other school districts in Marion County. Said the court in that paragraph:

> "Because, in 1969, 95 percent of the blacks in Marion County live in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "(A) substantial cause of interdistrict segregation." *Milliken v. Bradley* 418 U.S. 717, 745 (1974), and "(C) contributed to the separation of the races

> by . . . redrawing school district lines . . ." Id. at 755 (Stewart, U. concurring)."Id. at A19.

See *Wright v. City of Emporia,* 407 U.S. 451 (1972).

This evident reference to intent and purpose was given emphasis by the court's later remark that considerations of size, citizen participation and higher taxes (used in arguments against the 1959 consolidated school district plan),

> "Cannot justify legislation that has an obvious racial segregative impact." Id. at A19.

As Judge Tone correctly said in *Armstrong v. Brennan,* 539 F. 2d 625 (1976), at 634:

> "Purpose may of course be inferred from 'the totality of the relavent facts,' which may include discriminatory impact. *Washington v. Davis, supra,* — U.S. at —, 96 S. Ct. at 2049. As Mr. Justice Stevens said in his concurring opinion in that case, "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." Id. at —, 96 S. Ct. at 2054."

What actually happened in Indianapolis is that a black community was artificially confined to a single geographic area by state policy which at first encouraged and supported and, even in recent years, did not discourage local customs and practices which brought about and still are largely responsible for the segregation and separation of the races in IPS and between IPS and the surrounding school systems and their residential areas. It would be closing one's eyes and mind to reality not to conclude that this condition was the result of intention and purpose. The District Court and the Seventh Circuit, it is submitted, correctly perceived that reality.

C. Answers to specific points raised by various appellants and petitioners.

The Township of Perry emphasized on page 10 of its jurisdictional statement that it has always operated a unitary system and has not committed racially discriminatory acts. That is not relevant. The State of Indiana is responsible for education in the State, as shown by Judge Dillin in his *Indianapolis II* opinion. It is the state's intradistrict and interdistrict violations that give rise to an interdistrict violation and the need for an interdistrict remedy.

The Metropolitan School Districts of Lawrence, Warren, Wayne, and Decatur, and the Franklin Township School Corporation contend on page 24 of their jurisdictional statement that the decision below would "drastically limit the states' ability to accomplish civil reform." That is not so. This case involves a situation in which a state has been a substantial and purposeful cause of racial discrimination within and between school districts and which, rather than alleviating the situation, has passed legislation that makes the problem more difficult of solution.

The same districts contend on page 27 of their jurisdictional statement that the decree below will have a vast effect on their operations. However, under Indiana law, the IPS must pay for the cost of the transferred students. The record contains a yet undisputed finding by the district court that ample facilities exist in each affected school district to accommodate the too be transferred IPS students (IPS No. 76-520 p. A45).

Petitioners Bowen, Sendak, Negley, and the Indiana State Board of Education contend on page 23 of their petition for writ of certiorari that the Seventh Circuit

erred in suggesting that the District Court monitor its decree, perhaps on a yearly basis. A mere suggestion could hardly constitute reversible error. More important, the obvious purpose of the suggestion was to make it easier for the district court to reduce the number of pupils transferred if the Seventh Circuit's hopes were fulfilled that segregation and discrimination would be completely eradicated in the future. Surely it would not be erroneous to reduce the number of pupils transferred if the transfers became no longer necessary to effectuate a remedy.

Finally, IPS agrees that a limited interdistrict remedy is appropriate in this case. They are now without standing to contest the method used by the court to provide the relief, that is eliminate the constitutional violation. IPS contested the need for the interdistrict relief at the trial and contested the finding of the District Court regarding interdistrict relief on appeal to the Circuit Court of Appeals. The reasons given by IPS for the requested review are not within the statutory grounds which authorize issuance of writs of certiorari. The remedy employed by the District Court is not unconstitutional is reasonable and is supported by the record, nor does the remedy employed conflict with any ruling of any Circuit Court, or a ruling precedent of this Court.

IV

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument and appellees respectfully move the Court to dismiss this appeal and not to grant a writ of certiorari or, in the alternative, to affirm the judgment entered in the cause by the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN O. MOSS

Counsel for Appellee

JOHN PRESTON WARD

CHARLES D. KELSO